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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF CALIFORNIA,
STATE LANDS COMMISSION,
Petitioners,

v.

DEEP SEA RESEARCH, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in an *in rem* admiralty action seeking title and exclusive salvage rights to a shipwreck lying on the sovereign submerged lands of a State, application of the State's Eleventh Amendment immunity from suit is contingent upon the State first proving to a district court by a preponderance of the evidence that it owns the shipwreck.

2. Whether an insurance company's century-old claim to a portion of the cargo of an historic shipwreck precludes treatment of the shipwreck and its cargo as abandoned within the meaning of the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101–2106.

3. Whether the Abandoned Shipwreck Act preempts State title to, and protection and preservation of, shipwrecks on State submerged lands that are not within the coverage of the Act.

PARTIES BELOW

The parties below in addition to those named in the caption were the United States of America and the *Brother Jonathan*, her appurtenances, furniture, tackle, cargo, etc.

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OPINIONS BELOW

The opinion of the court of appeals, as amended on denial of rehearing, Pet.App. A1-A19, is reported at 102 F.3d 379. The opinion of the district court, Pet.App. A20-A58, is reported at 883 F.Supp. 1343.

JURISDICTION

The court of appeals filed its initial opinion on July 17, 1996 (89 F.3d 680). The court of appeals denied rehearing and filed its amended opinion on December 4, 1996. Pet.App. A1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution, which provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

2. The Abandoned Shipwreck Act of 1987, 102 Stat. 432, 43 U.S.C. §§ 2101–2106, which is set forth in Appendix F to the petition. Pet.App. A64–A68.

3. The Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301–1315, relevant portions of which are set forth in Appendix G to the petition. Pet.App. A69–A71.

4. Chapter 732 of California Statutes of 1989, which, *inter alia*, adopts sections 6309, 6313, and 6314 of the California Public Resources Code. Relevant portions of chapter 732 are set forth in Appendix H to the petition. Pet.App. A72–A78.

5. The definition of "abandoned shipwreck" in the Secretary of the Interior's Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50120–21 (1990), relevant portions of which are set forth in Appendix I to the petition. Pet.App. A79.

STATEMENT

A. The *Brother Jonathan*

The *Brother Jonathan* was built in New York in 1850 for service on the Panama route to the California goldfields. In the words of a New York Herald article in November of that year, she was "unique in her construction." She was one of the first oceangoing steamships to employ the single beam steam engine that previously had been used only on river and sound steamers. The engine generated 400 horsepower and drove two side paddlewheels, each 33 feet in diameter. Al-

though incorporating the latest in oceangoing motive power, the new ship nonetheless reflected strong links with the age of sail. Her masts were barkentine-rigged to carry sails, and she was wooden-hulled, the lines and form of her hull retaining at the bow and stern the scalloped forms of an earlier day. As built, the ship was 220 feet in length and 36 feet wide at the beam, had a depth of hold of 21 feet, and was built to carry 365 passengers. She had four lifeboats, two immediately forward and two aft of the paddlewheels. J.A. 389–92, 397–402, 423.

In the first year after her launching, the *Brother Jonathan* carried goldseekers and freight to Panama and Nicaragua from the Atlantic side. J.A. 402–03. In May 1852, after being rebuilt to carry more passengers, she sailed from New York to San Francisco by way of Cape Horn. *Id.* From then until 1856, she was engaged primarily on the Pacific side of the highly competitive Nicaragua route. J.A. 403–05. She was sold in 1856 and immediately placed into service as part of the busy north coast trade linking San Francisco with ports in Oregon, Washington, and British Columbia. J.A. 405, 408. "The ships of these companies were literally the commercial arteries of the Pacific Coast economy, carrying vital products of mine, forest, farm and factory to expanding consumption centers extending from California to British Columbia." J.A. 408.

Between 1856 and 1865, the *Brother Jonathan* was an integral part of the turbulent history of the west coast. She arrived in San Francisco in April 1858 with confirmation of the discovery of gold on the Fraser River in British Columbia, and she was the first American vessel to reach British Columbia with goldseekers. On that same voyage north, she carried 65 African-Americans from San Francisco's African Zion Methodist Episcopal Church, the first of several hundred black emigrants who were fleeing persecution under restrictive laws passed by the California legislature. In April 1859, she brought the news to Oregon of the Territory's admission to statehood. And during the 1861–62 gold rush on Idaho's

Salmon River, the *Brother Jonathan* was heavily involved, on one occasion transporting nearly a thousand goldseekers to Portland, the jumping off point for the mines. J.A. 406–09.

On Friday, July 28, 1865, the *Brother Jonathan* cleared the Golden Gate, outbound for Portland and Victoria under the command of Captain Samuel DeWolf. On board were approximately 250 passengers and crew. The ship called at Albion, Little River, and Mendocino on California's north coast, arriving at Crescent City, just south of the Oregon border, on July 29, where it offloaded cargo. Townspeople remarked that the ship appeared overloaded and riding deep in the water. After leaving Crescent City on Sunday morning, July 30, the ship encountered extremely heavy seas, and could not make headway. The captain ordered a return to Crescent City. While returning, the *Brother Jonathan* struck an uncharted submerged rock in the vicinity of St. George Reef. The *Brother Jonathan* went down in 250 feet of water approximately four and one-half miles from shore. Of those on board, all but 19 drowned. Only the third mate, 10 crew members, five women, and three children survived, having made it to shore in a single lifeboat. Among those lost were Anson Henry, Governor of Washington Territory; General George Wright, commander of the Army's Department of the Columbia, together with his wife and staff; and James Nesbit, editor of the San Francisco Bulletin newspaper, whose body later washed ashore with a farewell letter to his wife and children, which he had drafted in the ship's saloon during the half-hour to 45 minutes it took for the ship to sink.[1] It was the worst maritime disaster in California history. The cemetery in Crescent City where some of those drowned were buried is a California Registered Landmark. In recognition of

1. The *Brother Jonathan's* last hours and the circumstances of her sinking are preserved in the testimony of the ship's helmsman, who survived to tell the story at an inquest in San Francisco. His statement is set forth in the Appendix to this brief.

its historical significance, the *Brother Jonathan* has been determined eligible for listing in the National Register of Historic Places. J.A. 124, 127–31, 140–47, 232–33, 372–74, 409–11, 571–72.

B. The Abandoned Shipwreck Act of 1987

For years, the *Brother Jonathan* and other historic shipwrecks like her lay unfound and undisturbed on the floors of the world's oceans and other deep waterbodies. Beginning in the 1960s, however, rapid developments and improvements in underwater search and salvage technology subjected many of these long-lost wrecks to exploration—and exploitation. Vessels thought lost forever were located and subjected to salvage efforts.[2]

On many occasions, careless and inadequately supervised recovery of these shipwrecks resulted in irretrievable damage to the historical and archaeological value of these time capsules from the past.[3] In response, many States passed statutes

2. Some of the wrecks found in recent years include the *Nuestra Señora de la Atocha*, a Spanish galleon sunk in a hurricane off the coast of Florida in 1622; the *Central America*, sunk in 1857 off the east coast enroute from San Francisco to New York with an estimated $2 million in gold (1857 value); the *Lady Elgin*, lost off Waukegan, Illinois, in 1860; the *Titanic*; and the *Lusitania*. *See* Thomas J. Schoenbaum, Admiralty and Maritime Law § 16–7, p. 336 (2d ed. 1994).

3. For instance, the treasure salvage operations regarding the pirate ship *Whydah*, which foundered in a storm off Cape Cod in April 1717, and the *H.M.S. DeBraak*, a British warship lost at the mouth of the Delaware River in May 1798, have been variously described as "widely considered to be disasters in the archaeological community," J.A. 494, and "classic disasters in both archeology and cultural resources management," J.A. 562. The recovery operation on the *H.M.S. DeBraak* "saw considerable damage to human remains, artifacts and the vessel." J.A. 454. The problem is that "a salvor's myopic interest in salvaging valuable and trafficable materials from shipwreck sites often conflicts with proper methodology needed to fully preserve the archaeological and historical information and values of such sites." J.A. 477. *See also A Reporter at*

attempting to regulate abandoned shipwrecks on State-owned submerged lands and began intervening in *in rem* admiralty actions, brought by salvors, to assert their Eleventh Amendment immunity, claiming regulatory authority over, or title to, the vessel. *See, e.g.*, *State of Florida Dept. of State* v. *Treasure Salvors*, 621 F.2d 1340 (5th Cir. 1980); *Chance* v. *Certain Artifacts Found and Salvaged*, 606 F.Supp. 801 (S.D. Ga. 1984), *aff'd without opn.*, 775 F.2d 302 (11th Cir. 1985). In the territorial sea, the basis of the States' claim of title to these vessels was the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §§ 1301–1315 ("SLA").[4]

In the 1970s and 1980s, as the conflict began to play out in the federal admiralty courts, the results were uneven, often working against the protection and preservation of these shipwrecks that was sought by the States.[5]

Large: The Treasure of the DeBraak, The New Yorker, Aug. 15, 1988, at 33.

4. The SLA granted to the States submerged lands extending from the "coast line" to a point three geographic miles seaward. 43 U.S.C. § 1301(a)(2). The grant was of "title to and ownership of the lands beneath navigable waters . . . and the natural resources within such lands . . . and the right and power to manage and administer . . . said lands and natural resources," reserving to the United States powers of regulation and control for certain constitutional purposes, "which . . . shall not be deemed to include . . . proprietary rights of ownership, or the rights of management [and] administration . . . of the lands and natural resources which are . . . vested in and assigned to the respective States . . . by [the Act]." *Id.*, at §§ 1311(a), 1314(a).

5. The courts that examined whether the SLA grant included title to abandoned shipwrecks on the State's submerged lands were split. The majority of the federal admiralty courts held that (1) the SLA did not specifically assert United States title to shipwrecks and transfer title to the States, and (2) State historic preservation laws, whose provisions were deemed inconsistent with principles of maritime law, were superseded by those principles under the supremacy clause of the Constitution. *See, e.g.*, *Cobb Coin* v. *Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F.Supp. 186 (S.D. Fla. 1981); *Treasure Salvors* v. *Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978); H.R. Rep.

After several earlier attempts in the 1980s,[6] Congress enacted the Abandoned Shipwreck Act of 1987, 102 Stat. 432, 43 U.S.C. §§ 2101–2106 ("ASA"). Senator Bradley of New Jersey, when he introduced the bill, summarized the need for the legislation and the problems that had been encountered in the admiralty courts:

> "This bill provides for state management of historically valuable shipwrecks found in state waters. Because of recent court decisions, these irreplaceable cultural and recreational resources remain prey to commercial treasure salvors, who can operate beyond the bounds of federal or state oversight. . . .
>
> ". . . . . .
>
> "Under admiralty law, if a ship is judged by the courts to be in a condition of marine peril and a salvor can identify the wreck and prove he has the wherewithal to salvage it, the court may award him the right to do so despite state laws to the contrary.
>
> ". . . . . .
>
> "The United States is the only country in the world with a substantial number of historic shipwrecks that does not have a federal law recognizing the importance of preserving some of these sites. There is no federal law requiring orderly and archeologically correct excavation when salvage does take place. Instead, a finders-keepers principle applies to all shipwrecks in our waters. While this rule makes sense in matters of ongoing maritime

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No. 100-514, 100th Cong., 2d Sess., Pt. II (1988) *reprinted in* 1988 U.S.C.C.A.N. 370, 371. A minority of courts held that the SLA provided the States with title to shipwrecks on State submerged lands. *See, e.g.*, *Subaqueous Exploration* v. *Unidentified Wrecked Vessel*, 577 F.Supp. 597 (D. Md. 1983); H.R. Rep. No. 100-514, 100th Cong., 2d Sess., Pt. II (1988) *reprinted in* 1988 U.S.C.C.A.N. 370, 371.

6. *See* David R. Owen, *The Abandoned Shipwreck Act of 1987: Good-Bye to Salvage in the Territorial Sea*, 19 J. Mar. L. & Com. 499 (1988).

commerce, it is as obviously inappropriate for underwater archeological sites as it would be for ancient ruins on land. Under the current system, federal courts—sitting in admiralty—have substantial policymaking power, which has resulted in uneven judgments about the historical value of shipwrecks." 133 Cong. Rec. 7050 (1987) (statement of Sen Bradley).

Under the ASA, the federal government asserted title to certain historic shipwrecks and transferred that title to the States on whose submerged lands the shipwrecks are located. 43 U.S.C. § 2105. Title is transferred to abandoned historic shipwrecks that are either (1) embedded in a State's submerged lands, or (2) resting on a State's submerged lands and included in, or determined eligible for inclusion in, the National Register of Historic Places ("National Register"). *Id.*, at § 2105(a), (c). The grant clarifying the States' title to qualifying shipwrecks occurred immediately upon passage of the ASA.[7] The ASA further provides for the "management" of historic shipwrecks by the States pursuant to federal guidelines, *id.*, at §§ 2101, 2103, 2104, and removes such shipwrecks from the admiralty jurisdiction of the federal courts by providing that "the law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies," *id.*, at § 2106(a).[8] In enacting the ASA,

7. "The transfer of title takes place immediately upon enactment of this Act and simultaneously with the U.S. assertion of title under section 6(a)." H.R. Rep. No. 100-514, 100th Cong., 2d. Sess., Pt. II (1988) *reprinted in* 1988 U.S.C.C.A.N. 370, 376.

8. The law of salvage and the law of finds were not to be applied to qualifying wrecks because those concepts did not further the purpose of the Act—to preserve these historic resources. "The Committee finds that these admiralty principles are not well-suited to the preservation of historic and other shipwrecks to which this Act applies. Abandoned shipwrecks covered by this Act are not considered by this Committee to be in marine peril, necessitating their recovery by salvage companies." H.R. Rep. No. 100-514, 100th Cong., 2d. Sess., Pt. II (1988) *reprinted in* 1988 U.S.C.C.A.N. 370, 377.

Congress recognized that historic shipwrecks were "irreplaceable State resources for tourism, biological sanctuaries, and historical research," *id.*, at § 2103(a)(1), declared that it was congressional policy that the States allow for "appropriate" public and private sector recovery of shipwrecks in a manner "consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites," *id.*, at § 2103(a)(C), and directed the Secretary of the Interior to issue guidelines that would provide for the "comprehensive management of underwater resources related to historic shipwrecks" and that would seek to "maximize enhancement of cultural resources," *id.*, at § 2104(a).

C. California's Abandoned Shipwreck Legislation

As mentioned, prior to the ASA, many States, including California, had enacted their own legislation aimed at protecting, preserving, and regulating historic shipwrecks.[9] The first California legislation was enacted in 1959. It gave the State Lands Commission ("Commission") "exclusive jurisdiction with respect to salvage operations over and upon the ungranted tide and submerged lands of the State" and provided for issuance of salvage permits by the Commission, subject to "such rules and regulations . . . as it deems necessary to protect such lands and the uses and purposes reserved to the people of the State." Cal. Stats. 1959, ch. 1201.

In 1974, comprehensive historical preservation legislation of statewide scope was enacted, which created the State Historical Resources Commission. Cal. Stats. 1974, ch. 1156.

9. As the House report on the bill noted:

"[S]ome 28 States have laws that pertain to the management of abandoned or historic shipwrecks in state waters. It is estimated that the total number of shipwrecks in State waters is more than 50,000, of which some 5–10 percent may be of historical significance." H.R. Rep. No. 100-514, 100th Cong., 2d Sess., Pt. II (1988) *reprinted in* 1988 U.S.C.C.A.N. 370.

In 1986, legislation was enacted that declared that "California has a rich and varied maritime history," that "[t]echnological innovation relating to ocean salvage . . . has exposed these unique resources to damage and destruction," and that "there is an urgent need to protect . . . submerged historic maritime resources . . . to preserve and maintain objects of state or national significance for the benefit, education, and inspiration of all of the people of this state." Cal. Stats. 1986, ch. 1083, § 1. The statute empowered the Commission to issue excavation and salvage permits in State waters for "sites or resources determined to be of historical or archaeological significance," and directed the State Office of Historic Preservation to assist the Commission in this regard. *Id.*, at §§ 3, 4, pp. 3793–94.

In 1989, in response to passage of the ASA, the California legislature established the Shipwreck and Historic Maritime Resources Program, which continued in effect the regulatory responsibilities of the Commission and, for the first time, explicitly asserted a claim of title to all abandoned shipwrecks on State tide and submerged lands. Cal. Stats. 1989, ch. 732, §§ 3, 5.[10] The regulatory permit program, as amended, limited salvage permits to "individuals and organizations which demonstrate the capability to conduct those activities"; required the applicant to provide the Commission with "a detailed plan which provides for the protection and preservation of the site or objects or materials removed from the site consistent with contemporary professional standards of archaeological data recovery"; required the Commission to forward applications to the State Historic Preservation Officer "for technical review of the archaeological plan and recommendation concerning the preservation and protection of the site or resource"; required that permitted activities be "accomplished under the supervision of a person who meets the professional

10. The statute is codified at sections 6309, 6313, and 6314 of the California Public Resources Code.

qualifications required of a marine archaeologist"; authorized the Commission to require that a person "designated by the Commission . . . be present during all salvage operations to observe and monitor compliance with the terms of the permit"; and, where title was in the State, provided for "fair compensation to the permitholder in terms of a percentage of the reasonable cash value, or a fair share, of the objects recovered." *Id.*

D. Proceedings Below

The *Brother Jonathan* is thought to have carried gold coin and bullion and a U.S. Army payroll on her final voyage. J.A. 124, 127, 411. In 1988, the president of Deep Sea Research, Inc., Donald Knight, applied to the Commission for a permit to salvage cargo from the *Brother Jonathan*. J.A. 56, 108–09. Knight's company, which was then called Sea Epics Research, Inc., later decided, however, not to pursue the application. J.A. 93.

Thereafter, on November 1, 1991, respondent Deep Sea Research, Inc. ("DSR") brought an *in rem* action on the admiralty side of federal district court seeking exclusive salvage rights and title to the wreck of the *Brother Jonathan*. J.A. 37–57. Summons was issued, and a copy of the summons and complaint directed to Charles Warren, Executive Officer of the Commission,[11] with proof of service by mail attached. J.A. 58–66. In response to an inquiry from the State's counsel, counsel for DSR explained that the mailing was intended to give "notice" of the pending action to the State, but not to

11. The summons incorrectly identified Executive Officer Warren as "Commissioner, California State Lands Commission." J.A. 58. The summons advised Mr. Warren that "YOU ARE HEREBY SUMMONED and required to file with the clerk of this Court and serve upon PLAINTIFF'S ATTORNEY . . . an answer to the complaint which is herewith served upon you . . . . If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint." J.A. 58.

effect service. Mem. in support of State's mot. to intervene, p. 2; J.A. 2.

The State of California and the Commission (hereinafter sometimes jointly referred to as "the State" or "California") then intervened in the action for the limited purpose of asserting the State's Eleventh Amendment immunity. J.A. 68, 76. The United States also intervened to support the constitutionality of the ASA, which had been challenged by DSR. J.A. 72, 73. Upon DSR's initiative, however, the action was dismissed without prejudice on June 19, 1992. J.A. 72.

In February 1994, DSR reopened the case. *Id.* California promptly filed a motion to dismiss the action, invoking its sovereign immunity from suit under the Eleventh Amendment to the United States Constitution and stating that the ASA deprived the court of jurisdiction. J.A. 81, 88–89. DSR moved for a warrant for the arrest of the vessel, and for its appointment as the exclusive salvor. J.A. 121.

In support of its motion, the State explained that the action affected both its claimed ownership of the shipwreck and its right to regulate activities affecting historical and archaeological resources lying in or upon the State's sovereign submerged lands. J.A. 89, 91, 96–100, 104. The State claimed ownership under the ASA and both ownership and regulatory rights under the SLA and California Public Resources Code sections 6309, 6313, and 6314. *Id.* The parties subsequently stipulated that the *Brother Jonathan* lay on State-owned submerged lands. J.A. 221.[12]

At the September 9, 1994 hearing on the motions, the

12. The three geographical miles of the SLA grant run seaward from the "coast line," which includes offshore rocks within three miles of the mainland. Here, the presence of offshore rocks extended the area of California's submerged lands grant to include the site where the *Brother Jonathan* rests, four and one-half miles off the mainland. *See United States* v. *California*, 382 U.S. 448, 449–50 (1966) (supplemental decree); affidavit of Roy H. Minnick regarding motion to intervene, p. 3; J.A. 2, 115–16.

district court stated that it could not rule on the State's motion to dismiss without further evidence on the ASA issues of vessel "abandonment," "embeddedness," and eligibility for listing in the National Register. J.A. 194–95, 206. At a subsequent evidentiary hearing two and one-half weeks later, the State, with little time for preparation and without any discovery of DSR, presented limited evidence on these issues. Following the hearing, the district court denied the State's motion to dismiss, concluding that it had failed to carry its burden of proof "by a preponderance of the evidence." Pet.App. A20–A58, A59.

The district court also granted DSR a warrant for the arrest of the vessel, and appointed DSR sole custodian. Pet.App. A60–A61. It also appointed DSR exclusive salvor of the *Brother Jonathan*, awarded it "exclusive possession" of the vessel, and enjoined all others from conducting salvage operations or interfering with DSR's salvage efforts. Pet.App. A62–A63.

After California appealed, the United States filed a claim to a portion of the vessel's cargo. J.A. 305. Also, during the pendency of the appeal, the *Brother Jonathan* was determined eligible for listing in the National Register, J.A. 571,[13] and a

13. The *Brother Jonathan* was listed as eligible based on three criteria: it was property that (1) "is associated with events that have made a significant contribution to the broad patterns of our history," (2) "embodies the distinctive characteristics of a type, period, or method of construction or represents the work of a master, or possesses high artistic values, or represents a significant and distinguishable entity whose components lack individual distinction," and (3) "has yielded, or is likely to yield information important in prehistory or history." J.A. 373, 383, 571–72. Because of its high level of archaeological integrity, the *Brother Jonathan* is deemed "the best preserved of any Gold Rush steamer on the Pacific Coast," including three others that are listed on the National Register. J.A. 395, 398. The *Brother Jonathan* was only determined "eligible for listing," and not formally listed, because of the ongoing dispute over ownership. J.A. 571. The shipwreck was not nominated earlier because its location was not previously known, and that is a prerequisite for

request for judicial notice of that fact was filed with the court of appeals, J.A. 35.

On appeal, the Court of Appeals for the Ninth Circuit ruled that California, to successfully invoke its Eleventh Amendment immunity from suit by DSR in federal court, must establish a "colorable claim" to the *Brother Jonathan*. To do that, the State had to prove by a preponderance of the evidence the merits of its claim under the ASA. Pet.App. A9–A14. The court explained that it was appropriate for the district court to require the State to present evidence in support of its claims because "a federal court has both the power and duty to determine whether a case falls within its subject matter jurisdiction." Pet.App. A11. "Otherwise . . . the State could receive immunity simply by asserting that it was entitled to it." *Id.* The court concluded this branch of its opinion with the statement:

> "We find that . . . the party asserting immunity has the burden to establish that it is entitled to immunity *even if the determination of that issue touches the merits of the claim.*" (Italics added.) Pet.App. A13.

The court of appeals then turned to the issue of abandonment under the ASA. It held that the State had failed to prove that the *Brother Jonathan* had been completely abandoned. It concluded that the wreck must be treated as a "unified *res*," and that a portion of the cargo had not been abandoned because an insurer had paid a claim on it. That ruling was held to preclude vesting of State title to the vessel and the remainder of the cargo under the ASA, even if the vessel itself and the remainder of the cargo had been abandoned. The court held that not only a vessel but all of its cargo must be abandoned before title vests in a State under the ASA. Pet.App. A14–A19.

The court of appeals also concluded as a matter of law that

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nomination to the National Register. J.A. 274.

no abandonment existed here because "the technology required to salvage the *Brother Jonathan* has been developed only in the last few years, so that successful salvage efforts would have been impossible until very recently." Pet.App. A17.

Concerning California's independent claim of regulatory authority and title under the State statute and the SLA, the opinion concluded in a brief paragraph that Congress had preempted the California statute when it provided in the ASA's savings clause, 43 U.S.C. § 2106(b), that: "This chapter shall not change the laws of the United States relating to shipwrecks other than those to which this chapter applies." The court premised its conclusion on its assertion that claims involving all other shipwrecks are within the "exclusive" jurisdiction of federal admiralty courts and "thus" such claims are preempted because not based on the ASA. Pet.App. A7–A9, A11. Accordingly, the court ruled that California could not establish a "colorable claim" to the *Brother Jonathan* simply by asserting that the wreck lay on State submerged lands and that a State statute claimed ownership of such shipwrecks.

SUMMARY OF ARGUMENT

1. The Eleventh Amendment embodies a broad principle of sovereign immunity that cannot be swept aside by a federal court's assertion that it always has "jurisdiction to determine jurisdiction." Because an *in rem* action puts at issue the State's title to a shipwreck located on State sovereign submerged lands, a State is entitled to be dismissed from the action and to have the arrest of the vessel vacated. This Court in *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982), did not intend that a State need show a "colorable claim" to a shipwreck to successfully invoke its Eleventh Amendment immunity. Assuming its continued validity, the "colorable claim" test applies only to suits against State officers acting *ultra vires*. If indeed a State must make any specific assertion of title, that assertion is limited to a good

faith representation that a shipwreck is on the State's sovereign submerged lands.

2. The ASA was enacted by Congress to clarify the State's title to abandoned historic shipwrecks on the States' sovereign lands and to forestall application of admiralty law to actions concerning State regulation of, or title to, these vessels. General maritime law, as does Congress in the ASA, presumes abandonment of shipwrecks through (1) passage of time and (2) failure to salvage on the part of the owners. These two elements may be proved by circumstantial evidence. No express renunciation of ownership on the part of the owner is necessary to prove abandonment. Under the ASA and under the better reasoned cases applying general maritime law, a vessel need not be treated as a unified *res*. Nor does the lack of salvage technology at the time of the vessel's sinking militate against a conclusion that the vessel has been abandoned.

3. California Public Resources Code sections 6309, 6313, and 6314 embody California's regulatory program for abandoned shipwrecks and include California's statutory expression of "constructive possession" of all abandoned shipwrecks on its sovereign lands. Congress in the ASA did not intend, either expressly or impliedly, to preempt State statutes regulating the salvage of historic vessels or to preempt State statutes asserting title to a broader class of abandoned shipwrecks. The State legislation is consistent with the law of finds. The maritime law of salvage does not preempt California's shipwreck management program; the program is a valid exercise of California's regulatory authority under the police power. Any effects of California's shipwreck management program on the law of salvage are incidental and attenuated, and within California's permissible police power authority.

ARGUMENT

I. UNCONSENTING STATES ARE ENTITLED TO BE DISMISSED FROM *IN REM* ADMIRALTY ACTIONS INVOLVING ABANDONED SHIPWRECKS ON STATE SUBMERGED LANDS.

The Ninth Circuit's ruling would force California to adjudicate its title claim to the *Brother Jonathan* in order to successfully invoke its Eleventh Amendment immunity. This holding is wrong on its face. It subjects the State to "the indignity . . . of coercive process of judicial tribunals at the instance of private parties (internal quotation marks omitted)," *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), and endangers its property, the twin evils to be remedied by the enactment of the Eleventh Amendment. *Hess* v. *Port Authority Trans-Hudson Corporation,* 513 U.S. 30, 39–40, 47–49 (1994). The decision renders the Eleventh Amendment meaningless.

A. The Eleventh Amendment Embodies a Broad Principle of Sovereign Immunity

Although the language of the Eleventh Amendment reflects its specific purpose—to overturn the result in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), which involved a suit against a State by a citizen of another State—this Court has long recognized that the amendment's greater significance lies in its affirmation of the fundamental principle of State sovereign immunity. In *Hans* v. *Louisiana,* 134 U.S. 1 (1890), this Court held that the amendment embodied this broad principle of sovereign immunity, and that a federal court could therefore not entertain a suit against a State brought by a private person, whether that person was a citizen of another State or otherwise. As the Court held:

> "The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly

necessary to be formally asserted." 134 U.S. at 16.

This vision of the Eleventh Amendment as evidencing a "broader concept of immunity, implicit in the Constitution," accords with the views of Alexander Hamilton, James Madison, and John Marshall,[14] and has been consistently followed by a majority of this Court from *Hans* in 1890 to *Idaho* v. *Coeur d'Alene Tribe of Idaho*, __U.S.__, 117 S.Ct. 2028, 2033 (1997), decided just last term.[15]

B. The *In Rem* Admiralty Action Instituted by DSR Against the *Brother Jonathan* Is a Suit Against California Without Her Consent in Violation of the Eleventh Amendment

In order to further the Eleventh Amendment's "broad concept of sovereign immunity," its reach encompasses admiralty *in rem* actions involving State title to, and regulation of, historic shipwrecks on a State's sovereign submerged lands.

The Eleventh Amendment bars actions in admiralty against a State without the State's consent. *Ex parte New York, No. 1*, 256 U.S. 490, 497, 500 (1921) (impleading of State officer, seeking damages *in personam*). In *Welch* v. *Texas Highways & Public Transp. Dept.*, 483 U.S. 468, 473, 488 (1987), the Court recently reaffirmed the applicability of the

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14. *See Welch* v. *Texas Highways & Public Transportation Dept.*, 483 U.S. 468, 480 and n.10 (1987); *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 238, n.2 (1985); *Monaco* v. *Mississippi*, 292 U.S. 313, 323–325 (1934), for discussions of the Framers' arguments.

15. *See also Seminole Tribe of Florida* v. *Florida*, __U.S.__, 116 S.Ct. 1114, 1124 (1996); *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993); *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 98–99 (1983); *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 291–292 (1972) (Marshall, J., concurring in result); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 467 (1945); *Ex parte New York, No. 1*, 256 U.S. 490, 497 (1921).

Eleventh Amendment to admiralty actions:

> "[The] dissent argues that the doctrine of sovereign immunity has no application to suits in admiralty against unconsenting States. *Post*, at 497–504. This argument also is directly contrary to long-settled authority, as well as the Court's recognition that the Eleventh Amendment affirms the fundamental principle of sovereign immunity." (Internal quotation marks omitted.) *Id.*, at 488.

This Court has never suggested that the rule is otherwise when the proceeding is one *in rem* against property claimed by a State. In *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 38 (1992), the Court concluded that there is no general *in rem* exception to the sovereign immunity bar against monetary recovery.

The case closest in point is *Ex parte New York, No. 2*, 256 U.S. 503 (1921), a suit *in rem* in admiralty against the steam tug *Queen City*. The tug was owned by the State of New York and the Attorney General of New York appeared specially by way of a verified suggestion that the *Queen City* had at all times been the property of the State of New York. He prayed that "the vessel be declared immune from process and free from seizure and attachment, and that the libel and all proceedings thereunder be dismissed for want of jurisdiction." *Id.*, at 508–09. The district court overruled the suggestion and arrested the tug. This Court concluded that the vessel was exempt from process, and ordered that a writ of prohibition issue to prevent the further exercise of jurisdiction by the district court. *Id.*, at 509, 511. The only material difference between that case and this is that here, the State's claim is disputed, whereas there it was not; but that cannot be a basis for refusing to apply the Eleventh Amendment.[16]

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16. In *Florida Department of State* v. *Treasure Salvors*, 458 U.S. 670 (1982), a plurality of this Court treated as an open question whether a federal district court exercising *in rem* jurisdiction in admiralty may

The same Eleventh Amendment "broad principle of sovereign immunity" that led to this Court's decisions in *Ex parte New York, No. 2*, *Welch*, and most recently *Coeur d'Alene*, leads to the conclusion that a federal admiralty court may no more adjudicate California's title to the *Brother Jonathan* without the State's consent than it could seize the *Queen City* from the State of New York. The *in rem* action filed by DSR is a suit against California in violation of the Eleventh Amendment—one that will, if successful, deprive the State of its claim of regulatory authority over, and title to, the *Brother Jonathan*. Such a result is clearly within the ambit of the Eleventh Amendment:

> "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." (Internal quotation marks omitted.) *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 101, n.11 (1984).

A judgment declaring that the State possesses no interest in particular property is a judgment "against one of the United States" for constitutional purposes. *Cf. Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) (suit against federal officer barred by federal sovereign immunity); *Larson* v. *Domestic & Foreign*

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adjudicate rights in the property as against a State that does not appear and voluntarily assert its claim to the *res*. *Id.*, at 697. The concurring and dissenting justices, however, made clear their view that the Eleventh Amendment did apply to admiralty *in rem* proceedings. *Id.*, at 706–711 (White, J. concurring and dissenting, joined by then Associate Justice Rehnquist and Justices O'Connor and Powell). The plurality noted that State ownership of the vessel in *Ex parte New York, No. 2* was not disputed, *id.*, at 699, whereas the dissenting justices concluded that disputed ownership had no bearing on application of the Eleventh Amendment, *id.*, at 706–711.

Corp., 337 U.S. 682, 693–694 (1949) (same).

It makes no difference that the State is not named as a party to the action; the suit is nevertheless barred by the Eleventh Amendment. *See Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974); *Ford Motor Company* v. *Department of Treasury*, 323 U.S. 459, 464 (1945). As this Court stated in *Ex parte State of New York, No. 1*, 256 U.S. 490, 500 (1921):

> "As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the State was a party to the record . . . has long since been abandoned, and it is now established that the question is to be determined not only by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record . . . ."

The sole named party defendant to this action is the vessel itself, the *Brother Jonathan*. This is in keeping with the *in rem* character of the action as one brought against an item of property, rather than named persons, to establish rights "against all the world." No other defendants, governmental or otherwise, are named. The complaint alleges that the wreck is "lost or abandoned," J.A. 38; seeks "confirmation of title free and clear against all the world of any and all liens and encumbrances," J.A. 53, 55; and prays both for a declaration of DSR's "exclusive right of salvage and possession," J.A. 54, and for confirmation of its title "against all the world," J.A. 55. DSR knew that the wreck lay on the State's submerged lands and that the State claimed title, its predecessor corporation having previously applied to the Commission for a salvage permit. J.A. 108. Accordingly, DSR gave express notice by mail to the Commission of the pendency of the action. J.A. 65. At the time that the State's motion to dismiss was filed, and even months later when it was denied, the State was the sole person or entity asserting rights in, and regulatory authority over, the vessel and its cargo. It was not until later, after the State had appealed, that the federal gov-

ernment, the only other claimant, asserted a claim to a portion of the cargo. J.A. 304–06. The district court's interlocutory order confers upon DSR "sole and exclusive possession" of the *Brother Jonathan*, and enjoins "all competing salvors, would-be salvors, or divers . . . from interfering with DSR's efforts to recover artifacts from the *Brother Jonathan* [and] from conducting salvage operations or collecting artifacts" in a defined area. Pet.App. A62–A63. The State is not excepted from the sweep of this order.

From "the essential nature and effect of the proceeding, as it appears from the entire record," it is clear that this action is against the State. Had DSR wanted to proceed *in personam* to establish title against named persons, exclusive of the State, it had that option; it need not have proceeded *in rem*. See Supplemental Admiralty Rule C(1).

The effect of the Ninth Circuit's decision is that the State's title to the vessel will be finally adjudicated against the State in district court. Further, the effect of the injunction issued by the district court is to prevent California from exercising even its *regulatory* authority over DSR's salvage of the vessel.

Given the effects of this action on the State's property and regulatory authority, and given that the Eleventh Amendment embodies a "broad principle of sovereign immunity," it cannot reasonably be argued that this is not a suit against a State without its consent. As such, it is prohibited by the Eleventh Amendment.

C. The Colorable Claim Requirement Found in *Treasure Salvors* Applies Only to Suits Against State Officers Acting *Ultra Vires*.

The Ninth Circuit required California to prove that it had a "colorable claim" to the *Brother Jonathan* before it would recognize the State's claim to Eleventh Amendment immunity. Pet.App. A11. And this meant that the State had to prove each element of ownership under the ASA by a preponderance of the evidence in order to take advantage of its constitutionally guaranteed immunity. Pet.App. A14. The principal justification for requiring that California prove its claim in order to obtain its immunity was that federal courts have "jurisdiction to determine jurisdiction"; and that they therefore may, even when the Eleventh Amendment is invoked, legitimately reach the merits of a State's substantive claim. This premise was rejected by eight justices in *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982), implicitly by the plurality, *see id.*, at 681–682, n.14, 699–700, and expressly by the four dissenting justices, *id.*, at 702–703.[17]

The "colorable claim" language was first used by the plurality in *Treasure Salvors*. The term was specifically tailored, in reliance on *Ex parte Young*, 209 U.S. 123 (1908), to apply only to suits against *State officers* acting *ultra vires*. It has no applicability to *in rem* admiralty actions adjudicating as against a State *itself* the merits of a State's claim to abandoned shipwrecks.

Upon discovery of the *Atocha*, the State of Florida and Treasure Salvors entered into contracts concerning the salvage of the *Atocha*. At the time the contracts were signed, both parties believed that the vessel lay on Florida's submerged lands and was thus Florida's property. *Treasure Salvors*, 458

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17. "The [court of appeals] believed that it had 'jurisdiction to decide jurisdiction' and could therefore determine who owned the artifacts in order to ascertain whether the suit was, in fact, an action against the State. By holding that '[t]he court did not have the power . . . to adjudicate the State's interest in the property without the State's consent,' *ante*, at 682, the Court properly rejects this novel conception of the Eleventh Amendment. [Footnote omitted.] The appellate court's approach to the jurisdictional issue is not consistent with our prior cases; it incorrectly assumes that a federal court may adjudicate a State's right to ownership of specific property within the possession of State officials without the State's consent. The approach is unsatisfactory because, as Judge Rubin noted in dissent, it 'is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses.'" 458 U.S. at 702–703 (White, J., concurring and dissenting, joined by then Associate Justice Rehnquist and Justices O'Connor and Powell).

U.S. at 674. Subsequently in an action between the United States and Florida, this Court held that the submerged lands upon which the vessel lay did not belong to Florida. *Id.*, at 675–676.

Treasure Salvors then filed an *in rem* action in the district court to confirm its title to the *Atocha* and moved for an order arresting artifacts held by two officials of the State of Florida. The district court issued a warrant for arrest of the artifacts and the State of Florida resisted, principally on the basis of its Eleventh Amendment immunity. The district court ignored the State's objections and adjudicated title to the artifacts in Treasure Salvors. The Fifth Circuit upheld the district court, holding that the question of the ownership of the artifacts was essential to a resolution of the Eleventh Amendment claim. *Id.*, at 682.

A plurality of this Court upheld the Fifth Circuit's decision that the Eleventh Amendment did not bar the seizure of the artifacts from the Florida officials. The authority of the State officials to retain the artifacts was derived from a State statute asserting title to abandoned historic artifacts *on State-owned sovereign lands*. Since the *Atocha* was not on State-owned lands, the Florida officials did not have even a "colorable claim" to the artifacts, and federal process seizing the artifacts in their possession would not be a "suit against a State" in violation of the Eleventh Amendment. *Id.*, at 697.[18]

The plurality felt that the Florida officials' conduct fell squarely within *Ex parte Young* and the other "officer suit" cases. In *Ex parte Young*, this Court held that a federal action brought against a State official to enjoin his future enforcement of an unconstitutional State statute was not a suit against the State, and therefore did not violate the Eleventh Amend-

18. The four dissenters, however, felt that the Eleventh Amendment barred seizure of the artifacts regardless of the legality of the contracts or the location of the vessel. *Id.*, at 713 (White, J., concurring and dissenting, joined by then Associate Justice Rehnquist and Justices O'Connor and Powell).

ment. 209 U.S. at 155–156.

While the rule permitting suits alleging conduct by State officers contrary to "the supreme authority of the United States" has survived, the theory of *Ex parte Young* has not been expansively interpreted. *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 102 (1984). Thus in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), this Court held that when a plaintiff sues a State official alleging a violation of federal law, a federal court may issue an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief. *Id.*, at 666–667.

This distinction between the State's officers and the State itself was underscored when the *Treasure Salvors* plurality went on to reverse the Fifth Circuit's adjudication of title to the artifacts as against the State itself, holding:

> "The Eleventh Amendment thus did not bar the process issued by the District Court to secure possession of the artifacts of the *Atocha* held by the named state officials. *The proper resolution of this issue, however, does not require—or permit—a determination of the State's ownership of the artifacts.*" (Italics added.) 458 U.S. at 699.

Although the underlying action in *Treasure Salvors* was one *in rem*, the plurality's entire focus was on the right of the Florida officials to retain possession of the artifacts pursuant to the contracts after it had been conclusively determined that the vessel did not lie on Florida's submerged lands. In determining that the Florida officials had no "colorable claim" to the artifacts, the plurality was only applying the *Ex parte Young* exception and was not adopting a standard to be used when assessing a State's claim to Eleventh Amendment immunity, such as California's in the present case. The plurality made clear that the title of the State itself to the artifacts should not have been adjudicated below:

> "[T]he Court of Appeals improperly adjudicated the State's right to the artifacts. While such an adjudication

would be justified if the State voluntarily advanced a claim to the artifacts, it may not be justified as part of the Eleventh Amendment analysis, the only issue before us." *Id.*, at 700.

The plurality explained that "the warrant itself merely secures possession of the property; its execution does not finally adjudicate the State's right to the artifacts. See *Tindal* v. *Wesley*, 167 U.S., at 223." 458 U.S. at 697.

Accordingly, California in this case should not have been constrained to prove that it had a "colorable claim" to the *Brother Jonathan*. If indeed there is any type of threshold requirement for invocation of the Eleventh Amendment in cases such as this, where such fundamental property and regulatory interests are at stake, it should be enough for a State to attest in a pleading, such as a special appearance to file a motion to dismiss, that the shipwreck is on its property. In *Ex parte New York, No. 2*, this Court accepted as sufficient to invoke the State's Eleventh Amendment immunity the verified suggestion of the Attorney General of New York that the tug arrested by the district court was owned and controlled by the State of New York. Further, Rule 11(b) of the Federal Rules of Civil Procedure states that *any* pleading filed in federal court warrants that it is not being filed for an improper purpose, that its legal contentions are supported by existing law or by a nonfrivolous argument to change existing law, that any factual contentions have evidentiary support and that any denials of opposing factual contentions have evidentiary support. Fed. R. Civ. P. 11(b). Any further inquiry by the district court, let alone requiring proof of all elements by a preponderance of the evidence, not only subjects the State to the "indignity of federal court process at the insistence of private parties," *Puerto Rico Aqueduct, supra*, 506 U.S. at 146, but begins the forbidden inquiry into the merits of the State's claim, *Treasure Salvors*, *supra*, 458 U.S. at 700; *see Zych* v. *Wrecked Vessel Believed to Be the Lady Elgin*, 960 F.2d 665, 670 (7th Cir. 1993) (strength of the State's claim is

irrelevant; Eleventh Amendment prevents the district court from exercising jurisdiction); *Maritime Underwater Surveys, Inc.* v. *The Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6, 8, (1st Cir., 1983) ("Because this is not a claim against a named State official, and because of the Eleventh Amendment's flat prohibition of suits against states regardless of their merit, we need not reach the colorability of the Commonwealth's claim. . . .")[19]

D. The *Brother Jonathan* Rests on California's Sovereign Submerged Lands, Lands of Unique Public Trust Character

The Eleventh Amendment is one of the attributes of California's sovereignty. The right to possession of and control over its sovereign lands is another of California's attributes of sovereignty. The *Brother Jonathan* rests on, or is embedded

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19. As demonstrated in subheading B, *supra*, although this *in rem* action named neither the State nor any of its officials, it was a "suit against the State" in violation of the Eleventh Amendment. At some future stage of the proceeding, DSR may attempt to avail itself of the *Ex parte Young* exception and recast this action as a suit against the Executive Officer of the Commission or the members of the Commission by personally naming, and seeking injunctive relief against, these State officials. *See Coeur d'Alene*, *supra*, 117 S.Ct. at 2032. Such a procedural initiative by DSR might implicate the continuing vitality and meaning of the "colorable claim" language of *Treasure Salvors*.

Again, however, pursuant to *Ex parte New York, No. 2*, it should be sufficient for California to allege, in a pleading meeting the requirements of Federal Rule of Civil Procedure 11(b), that the vessel is on State sovereign lands. *Treasure Salvors*, 458 U.S. at 711 (White J., concurring and dissenting, joined by then Associate Justice Rehnquist and Justices O'Connor and Powell) (had the *Atocha* rested on State submerged lands, "it would be beyond cavil that Florida owned one-fourth of the artifacts pursuant to its ownership of the submerged land on which the *Atocha* rested as well as the contracts"). Alternatively, the absolute maximum that should be asked of a State is a pleading alleging that the State has a claim to the vessel, whether under a State statute, pursuant to the ASA, or upon some other basis.

in, California's submerged lands. Lands underlying navigable waters have historically been considered "sovereign lands." *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 195–198 (1987). California received title to its submerged lands in the territorial sea pursuant to the SLA and holds these lands for the benefit of all the State's citizens subject to the public trust for commerce, navigation, and fisheries. *Illinois Central R. Co.* v. *Illinois*, 146 U.S. 387, 452–453 (1892); *Marks* v. *Whitney*, 6 Cal.3d 251, 491 P.2d 374 (1971). Broad statements of State public trust dominion over tidelands have been included in this Court's opinions since the early 19th century. *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469, 473–477 (1988).

Just last term, this Court cautioned that federal courts must be vigilant when private actions affect State sovereign lands. In *Idaho* v. *Coeur d'Alene Tribe of Idaho*, the Coeur d'Alene Tribe brought an action for injunctive and declaratory relief in federal district court against the State of Idaho and several State officials seeking to restrain the officials from taking any action in possessing or managing the bed of Lake Coeur d'Alene or its tributaries in violation of the Tribe's rights under its treaty with the United States. 117 S.Ct. at 2032. The Court held that the lands in question were an important attribute of Idaho's sovereignty "with a unique status in the law and infused with a public trust the State itself is bound to respect." *Id.*, at 2041. Because if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy on the State treasury, the Court refused to apply the *Ex parte Young* exception and found that the action was a "suit against a State" in violation of the Eleventh Amendment. *Id.*, at 2043.

The orders issued by the district court in this case amount to nothing less than a usurpation of one of the most important attributes of California's sovereignty—the management and control of its sovereign lands. California's authority over its sovereign lands has been affected to no less a degree than that

found unacceptable in *Coeur d'Alene*.

California also has police power regulatory authority over the submerged lands on which the vessel rests. *See* heading III B, *infra*. Along with its grant of title, the SLA recognized "the right and power [of the States] to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law." 43 U.S.C. § 1311.

Yet without any lease or permit from the State and without any review by the State of DSR's activities on California's sovereign lands, the district court has allowed DSR to commence salvage of the *Brother Jonathan*, and has issued an injunction that prohibits the State from interfering in any way. J.A. 299–300. The array of protective measures that the California legislature so carefully fashioned to protect the historic and archaeological values of shipwrecks on its sovereign submerged lands, Cal. Pub. Res. Code §§ 6309, 6313, is thus completely nullified.

E. DSR May File a Quiet Title Action in State Court to Determine the Ownership of the *Brother Jonathan*

The court of appeals held, mistakenly, that federal admiralty courts retain "exclusive" jurisdiction over cases involving wrecks that do not meet the terms of the ASA. *See* heading III, *infra*. DSR has an adequate remedy available to it in the California courts. Section 760.020 of the California Code of Civil Procedure allows for an action "to establish title against adverse claims to real or personal property or any interest therein." Cal. Code Civ. Proc. § 760.020(a). The State may be named as a party. Cal. Code Civ. Proc. § 762.090(a). The California Senate Committee comment following section 762.090 states that the intent is to make clear that California has waived any vestige of sovereign immunity that may previously have had viability in quiet title actions.

DSR's right to a final adjudication, between it and the State, of the title to the *Brother Jonathan* is fully protected under State law.

II. THE RESTRICTIVE INTERPRETATION OF ABANDONMENT BELOW WILL SEVERELY LIMIT APPLICATION OF THE ASA

The Ninth Circuit held that the State had failed to prove that the *Brother Jonathan* had been completely abandoned. While acknowledging the traditional maritime rule that abandonment of a wrecked vessel can be inferred from relevant facts and circumstances, Pet.App. A15–A16, it nonetheless concluded that the wreck must be treated as a "unified *res*," and that a portion of the cargo had not been abandoned because two insurers had allegedly paid claims on it. That ruling was held to preclude vesting of State title to the vessel and the remainder of the cargo under the ASA, even if the vessel itself and the remainder of the cargo had been abandoned. Pet.App. A14–A19. In addition, the Ninth Circuit held that an owner would be excused from attempting to salvage the vessel if the technology to do so was not available at the time of the vessel's loss. Pet.App. A17. The Ninth Circuit's decision renders successful State assertions of ownership under the ASA extremely problematic.

There is a conflict between the Ninth and Fourth Circuits over the questions of abandonment and the need for a "unified *res*." Even if the case is dismissed as to California on Eleventh Amendment grounds, the abandonment questions will affect the ongoing litigation between the United States and DSR over ownership of the cargo aboard the *Brother Jonathan*. The petition for certiorari in *Fairport Intern. Exploration* v. *Shipwrecked Vessel*, 105 F.3d 1078 (6th Cir. 1997), *petition for cert. filed* June 4, 1997, presents the identical question of the definition of abandonment under the ASA. This case, therefore, presents a situation where this Court should reach beyond the Eleventh Amendment issue and decide the legal questions of what constitutes "abandonment" under the ASA. *See, e.g.*, *ASARCO* v. *Kadish*, 490 U.S. 605, 612–619 (1989) (although federal standing requirements not met, Court will decide the merits); *Honig* v. *Doe*, 484 U.S. 305, 317–323 (1988) (although moot, reasonable likelihood that respondents will again suffer the deprivation of rights that gave rise to the suit; Court will reach merits).

A. The ASA and General Maritime Law Allow Abandonment of a Shipwreck to Be Established by Circumstantial Evidence

The first element necessary for successful State assertion of title to shipwrecks lying on California's submerged lands, whether pursuant to the ASA or the State statute, is that the wreck must be "abandoned." 43 U.S.C. § 2105(a); Cal. Pub. Res. Code § 6313(a). Under maritime law as it developed in this country, abandonment could be presumed based simply on (1) the long passage of time since the shipwreck, and (2) failure of the owner to make efforts to locate and recover it.[20]

Congress clearly intended that the definition of "abandoned"

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20. *See* Thomas J. Schoenbaum, Admiralty and Maritime Law § 16–7, p. 339 (2d ed. 1994) ("In the treasure salvage cases, often involving wrecks hundreds of years old, the inference of abandonment may arise from lapse of time and non-use of the property."); *Fairport Intern. Exploration* v. *Shipwrecked Vessel*, 105 F.3d 1078, 1085 (6th Cir. 1997), *petition for cert. filed* June 4, 1997 ("[A]bandonment may, for some purposes at least, be inferred from the surrounding circumstances.") *Martha's Vineyard Scuba Hq.* v. *Unidentified Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) (property is "presumptively abandoned" when "so long lost that time can be presumed to have eroded any realistic claim of original title"); *Klein* v. *Unidentified, Wrecked and Abandoned Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) ("[I]t would be absurd to apply maritime salvage law to a vessel whose very location has been lost for centuries."); *Moyer* v. *Wrecked and Abandoned Vessel*, 836 F.Supp. 1099, 1105 (N.J. 1993) ("Abandonment may be inferred from circumstantial evidence. Factors such as lapse of time and nonuse by the owner may give rise to an inference of an intent to abandon."); *Chance* v. *Certain Artifacts Found and Salvaged*, 606 F.Supp. 801, 804 (S.D. Ga. 1984), *aff'd without opn.*, 775 F.2d 302 (11th Cir. 1985) ("[T]he inference of abandonment may arise from lapse of time and nonuse of the property.").

developed in general maritime law should be applied to determine whether a vessel meets the criteria of section 2105(a) of the ASA. H.R. Rep. No. 100-514, 100th Cong., 2d. Sess., Pt. II (1988) *reprinted in* 1988 U.S.C.C.A.N. 370, 374 ("[T]he act of abandonment may be implied or inferred from the circumstances of the shipwreck as when an owner has never asserted any control over or otherwise indicated a claim of possession.").

The Fourth Circuit has adopted a different rule. It held in *Columbus-America Discovery Group* v. *Atlantic Mutual Insurance Co.*, 974 F.2d 450, 464 (4th Cir. 1992), that abandonment must be proved by "clear and convincing evidence," such as an owner's express declaration abandoning title. The district court had inferred from the passage of time, the claimants' inaction, and all of the other relevant facts and circumstances that the 39 insurance companies making claims to the gold carried on board the vessel had abandoned any interest that they may have had in the ship's cargo.[21] The Fourth Circuit reversed, holding that although the hull and the passenger gold and effects on the ship were admittedly abandoned, the remainder of the cargo claimed by the insurance companies could not be considered abandoned unless Columbus-America could prove by "clear and convincing evidence" that the insurance company claimants had made an "express abandonment." *Columbus-America*, 974 F.2d at 461, 464, 468. The Fourth Circuit thus erected a legal presumption of nonabandonment upon a showing that cargo was insured.

The Ninth Circuit, however mistaken in other areas of the *Brother Jonathan* opinion, was correct when it stated that the Fourth Circuit had injected "a significant modification in maritime law." Pet.App. A15.

The Fourth Circuit's more restrictive definition of abandon-

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21. *Columbus-America Discovery Group* v. *Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F.Supp. 1327, 1343-1348 (E.D. Va. 1990).

ment would frustrate the intent of Congress to transfer to the States the title to these historically significant vessels so that they can be preserved and enjoyed by the public. To assure that the congressional purpose is given effect, the Court should adopt the definition of "abandonment" for cases under the ASA that allows a court to infer or presume abandonment from passage of time and failure by the owner to salvage the vessel.[22] This would be in keeping with the rulings of the clear majority of lower courts that have considered the issue.

Here, no one appeared to claim ownership of the vessel, and the original owner, the California Steam Navigation Company, appears to no longer be in existence. J.A. 233. The vessel has lain undisturbed on the ocean floor for over 130 years. J.A. 233-36. No evidence could be found that the original owner of the vessel had attempted to salvage the *Brother Jonathan*. J.A. 234. No evidence could be found that any owners or insurers of the cargo had attempted to salvage the *Brother Jonathan*. J.A. 235. The vessel itself seems to have been uninsured. J.A 234. Two-thirds of the cargo was said to have been uninsured.[23] J.A. 239. No evidence has been produced to tie any insurance proceeds paid

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22. Under California law, the presumption of abandonment is a presumption affecting the burden of proof. Cal. Evid. Code § 605. The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. Cal. Evid. Code § 606. Thus while a vessel may be presumed "abandoned" after the passage of time without salvage, that presumption is open to challenge by a salvor.

23. While DSR submitted an agreement between it and two insurance companies that recites that the companies' predecessors paid claims on the vessel or portions thereof, J.A. 148-54, there is no proof in the record that the vessel was insured, or that any insurance claims were paid for it. DSR's declaration is careful to leave this ambiguous. J.A. 138. Three of the insurance companies listed in a newspaper article as having allegedly insured portions of the cargo are presumably no longer in business. Compare list at J.A. 145 with J.A. 139-40. Further, DSR has not tied any specific item of the cargo to an insurance policy. J.A. 239-40.

to any specific item of cargo. J.A. 239.

B. The Ninth Circuit's "Unified *Res*" Rule Will Prevent Successful Assertions of State Title to Many Shipwrecks Entitled to Protection Under the ASA.

The Ninth Circuit's insistence on a "unified *res,*" even in the face of the evidence of the abandonment of at least the hull and the majority of the cargo aboard the *Brother Jonathan*, will frustrate the intent of Congress to perfect the State's title to "abandoned" shipwrecks. A principal purpose of the ASA was to remove control over historic shipwrecks from the federal admiralty courts and to dispel confusion and conflict concerning ownership of historic shipwrecks as between the States and private salvors. H.R. Rep. No. 100–514, 100th Cong., 2d Sess., Pt. I (1988), *reprinted in* 1988 U.S.C.C.A.N. 366; H.R. Rep. No. 100–514, 100th Cong., 2d Sess., Pt. II (1988) *reprinted in* 1988 U.S.C.C.A.N. 371, 377; S. Rep. No. 100–241, 100th Cong., 1st Sess. 3–4, 6–7 (1987). Congress was animated by a concern that the careless, archaeologically unsound recovery of historic shipwrecks, solely for the economic value of their artifacts and without sufficient oversight from historians and trained archaeologists, would result in the destruction of invaluable and irreplaceable cultural and historical resources. *Id.* It felt that traditional admiralty law, deriving solely from a concern with the commercial rights of shipowners and salvors, did not afford consideration to archaeological or historical factors in determining who was entitled to recover a shipwreck. *Id.*

The court of appeals' insistence on complete abandonment also directly conflicts with the implementing guidelines issued by the Secretary of the Interior in response to the Congressional mandate. The Guidelines expressly state that a vessel is not abandoned "[w]hen the owner of a sunken vessel is paid *the full value* of the vessel." (Italics added.) Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50116, 50120–21 (1990). The necessary implication is that a vessel is deemed abandoned under the ASA if an insurer has not paid a claim for its full value. By force of reasoning, a vessel and portions of its cargo on which *no* insurance claims have been paid are abandoned for purposes of the ASA.

Further, the Ninth Circuit's insistence on maintaining a "unified *res*" has introduced conflict and confusion concerning the proper application of the ASA's use of the term abandoned, because its holding directly conflicts with the view of the Fourth Circuit, which does not insist upon there being a single owner of a shipwreck and its cargo, but instead allows for the possibility that ownership of the vessel and of different portions of the cargo may rest with different parties. *Columbus-America Discovery* v. *Atlantic Mutual Insurance Co.*, 974 F.2d 450, 465–469 (4th Cir. 1992); *accord, Bemis* v. *RMS Lusitania*, 884 F.Supp. 1042, 1053 (E.D. Va. 1995), *aff'd without opn.*, 99 F.3d. 1129 (4th Cir. 1996) (salvor secured title to the hull of the ship from insurance company but was denied title to the cargo and personal belongings through subrogation because the insurer never had a legal interest in the cargo or other belongings).

In *Columbus-America*, a non-ASA case, the Fourth Circuit found little trouble in giving directions on how a court should examine the evidence in deciding which portions of the cargo and passenger personal effects were abandoned and what salvage award would be appropriate for Columbus-America. 974 F.2d at 465–469.

The Ninth Circuit cited two reasons why it could not follow the lead of the Fourth Circuit in *Columbus-America*. First, it held that to divide the *res* was to divide the jurisdiction over the vessel between federal and State courts. Pet.App. A18. Parallel jurisdiction in *in personam* actions has never been viewed as a crippling interference with the jurisdiction of either court. *See Venco Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 641–642 (1977) (the traditional view is that *in personam* actions in federal and State courts may proceed concurrently, without interference from either court). In order to accommodate California's Eleventh Amendment immunity, DSR will

need to participate in a second action between it and the State over the *Brother Jonathan* in State court.

Second, the court felt constrained to treat the vessel as either all abandoned or all nonabandoned because of the "general rule" in admiralty treating wrecks as a legally unified *res*. No authority is cited for this proposition. *See* Pet. App. A18. Whatever the state of general maritime law, after the passage of the ASA, unless insurance companies have paid the *full value* of the vessel *and* its cargo, the vessel and cargo are *presumed* abandoned for purposes of the ASA. Of course, if it is proved by a claimant that some specific portion of the vessel or cargo was insured, a payment was made on the claim, and the insurance company did not subsequently abandon the claim, then that property could be awarded to that claimant. The vessel and the remainder of the cargo, however, are the property of the State.[24]

Just how damaging the application of admiralty principles can be to implementation of the ASA is demonstrated by the Ninth Circuit's decision on this issue. It is undisputed from the evidence in the record that the vessel and two-thirds of the cargo were uninsured. J.A. 145, 234, 239. Of the one-third of the cargo that was reported as insured in a newspaper article, DSR has obtained agreements from insurance companies covering $20,000 of the $48,000 allegedly paid on the cargo. J.A. 138–39. DSR has so far not established that any insurance claims were paid or, if payments were made, to what portions of the cargo they pertained. Thus the Ninth Circuit has, on the basis of DSR claiming subrogation rights to less than *one-sixth* of the cargo, found that the other *five-sixths* of the cargo, and the vessel itself, were not abandoned.

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24. The State of course has, regardless of ownership, general police power regulatory authority over the entire vessel and its contents, just as it does over privately-owned historic structures on land. *See Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123–128 (1978).

C. The Ninth Circuit's "New Technology" Exception to the Common Law Rule That Abandonment May Be Inferred From Passage of Time Would Swallow the Rule

The Ninth Circuit, while professing to follow the general maritime rule that abandonment may be inferred from the circumstances of the case, has introduced an exception which all but swallows the rule. The Ninth Circuit held that "when the technology to conduct salvage operations has been developed recently, failure on the part of an owner to attempt to salvage the wreck does not give rise to an inference that the owner has abandoned title to the vessel." Pet.App. A17. The only authority cited by the Ninth Circuit is a case arising in the Northern District of Illinois that was later vacated by the Seventh Circuit. Pet.App. A17; *See Zych* v. *Unidentified, Wrecked & Abandoned Vessel, Believed to be SB "Lady Elgin,"* 755 F.Supp. 213 (N.D. Ill. 1991), *vacated*, 960 F.2d 665 (7th Cir. 1992).

Since technology is continually evolving, no vessel, no matter how deep the water in which it lies, how difficult to salvage, or how many centuries have passed since its sinking, can ever be considered abandoned if the Ninth Circuit's ruling is allowed to stand. Lack of salvage efforts, in the absence of available recovery technology, would be conclusively presumed to evidence a "wait and see" attitude by the shipowner. Only by an express relinquishment of ownership could a vessel be deemed abandoned in such cases. Successful State assertions of title to these vessels under the ASA would be all but impossible. Indeed, the very reason why the wrecks were abandoned by the owners after they sank was *because* the technology did not exist to locate and recover them or was too expensive to be economical. The Ninth Circuit's exception illustrates why Congress felt that the admiralty courts were so unsympathetic to the efforts on the part of the States to preserve these valuable historic resources. *See* H.R. Rep. No. 100–514, 100th Cong., 2d Sess., Pt. II (1988) *reprinted in*

1988 U.S.C.C.A.N. 370, 377.

III. THE ASA DID NOT PREEMPT STATE LAWS AIMED AT PROTECTING AND PRESERVING ABANDONED SHIPWRECKS ON STATE SOVEREIGN LANDS

The Ninth Circuit, in a brief and conclusory paragraph, held that Congress, in enacting the ASA, preempted State statutes, including California Public Resources Code section 6313 ("Section 6313"), that asserted title to abandoned shipwrecks on State-owned submerged lands. Pet.App. A7–A9. The court did not find the preemption in the substantive portions of the ASA but instead found it in the "savings clause," 43 U.S.C. § 2106(b). Section 2106(b) states that "This chapter shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies." Contrary to the court's holding, the language of the ASA and its legislative history establish that Congress was aware that the States had individual historical preservation programs and intended that they remain in effect.

California amended its abandoned shipwreck legislation in 1989 in response to section 2103 of the ASA, enacting the Shipwreck and Historic Maritime Resources Program. Cal. Pub. Res. Code §§ 6309, 6313, 6314 ("Shipwreck Program"). The Shipwreck Program is broader than the ASA in one respect: California claims title to all abandoned shipwrecks on its sovereign submerged lands, not just those that are embedded or historically significant. Cal. Pub. Res. Code § 6313(a). By asserting title to all abandoned shipwrecks on its sovereign lands, California established its "constructive possession" of abandoned property located on its submerged lands, thereby coming within one of the landowner exceptions

to the law of finds.[25] For the reasons that follow, this difference in scope between what Congress encouraged the States to do and what California has actually done does not implicate the law of federal preemption.

A. Congress Did Not Expressly or by Implication Preempt State Laws Asserting Title to Shipwrecks Not Covered by the ASA

The ASA confirms title in the States to abandoned shipwrecks on State-owned lands that are either (1) embedded or (2) included in, or eligible for inclusion in, the National Register. 43 U.S.C. § 2105(a). This Court must decide if the "savings clause" contained in 43 U.S.C. § 2106(b) preempted all State statutes regulating, or asserting title to, a larger class of shipwrecks than that included in section 2105(a).

At the outset, one must question whether a federal statute can "preempt" a State's title to land. While the regulatory aspect of California's Shipwreck Program might conceivably be subject to preemption, it is difficult to see how Congress, even if it so intended, could nullify a State's title, or title claims, to land. Here, title to abandoned property on these offshore submerged lands either vested in the coastal States in 1953 by virtue of the SLA or it did not. Any dispute about that between the Federal and State governments would be for

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25. Under the law of finds, abandoned property belongs to the finder with two exceptions. First, where the property is "embedded" in the land, it becomes part of the realty and belongs to the landowner. *Klein* v. *Unidentified Wrecked Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *Chance* v. *Certain Artifacts Found and Salvaged*, 606 F.Supp. 801, 805 (S.D. Ga. 1884), *aff'd without opn.*, 775 F.2d 302 (11th Cir. 1985). Second, where a landowner asserts constructive possession of the abandoned property, it belongs to the owner of the land where the property is found. *See Marx* v. *Government of Guam*, 866 F.2d 294, 299, 301 (9th Cir. 1989); *Klein, supra*, 758 F.2d at 1514.

the courts to decide. Presumably Congress cannot unilaterally resolve the issue. However that may be, the preemption issue here is an important one because of the impact of the Ninth Circuit's decision on California's authority, under its police power, to regulate abandoned shipwrecks on its land, regardless of who owns them.

Preemption of State statutes by Congress is not lightly to be presumed. *California Federal S. & L. Assn.* v. *Guerra*, 479 U.S. 272, 281 (1987). The basic assumption is that Congress did not intend to displace State law. *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981). In determining whether a State statute is preempted by federal law, this Court's sole task is to ascertain the intent of Congress. *Guerra*, 479 U.S. at 280.

Congress may preempt State law in three ways when acting within constitutional limits. First, Congress may expressly declare its intent to preempt. *See, e.g., Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Examining the substantive language of the ASA, there is no evidence of express congressional intent to preempt.

Second, Congress may enact a scheme of federal regulation that is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary State regulation. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Here, rather than occupying the field of shipwreck ownership and protection, Congress has *encouraged* the States to actively manage these important historical resources. 43 U.S.C. § 2103.[26] Indeed, the Seventh Circuit

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26. The debates in Congress highlight this congressional intent, as well as knowledge and acceptance of State activity in the shipwreck field. As one of the principal sponsors of the bill stated:

"The States also are not operating in a vacuum in this area. Based on their interpretation of the 1953 Submerged Land Act, some 27 States have developed laws and programs that pertain to the management of historic shipwrecks. Many of the States have written to me expressing their intention of continuing to implement these same laws and programs even after passage of Federal legislation confirming their title to abandoned shipwrecks." 134 Cong. Rec. 5338 (1988) (statement of Rep. Walter B. Jones).

Even opponents of the law recognized that the law was not intended to displace State law, but rather to strengthen its enforceability. *See id.*, at 5337 (remarks of Rep. Shumway).

has recognized that, rather than preempting State regulation, the ASA was intended as an intentional "waiver of preemption" by Congress. *Zych* v. *Unidentified, Wrecked and Abandoned Vessel Believed to be the Seabird*, 941 F.2d 525, 533, n.12 (7th Cir. 1991).

Third, in areas where Congress has not completely displaced State regulation, federal law may nonetheless displace State regulation to the extent it actually conflicts with State law. As this Court has framed the test:

> "Such a conflict occurs either because compliance with both federal and state regulations is a physical impossibility . . . or because state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Citations and internal quotation marks omitted.) *Guerra*, 479 U.S. at 281.

The ASA and California's Shipwreck Program both have the same objective—the control, preservation, and management of historically significant shipwrecks. There is no conflict between the two; the Shipwreck Program is simply more comprehensive in the wrecks that it covers, and there is nothing in the language or legislative history of the ASA that prevents this.

B. General Maritime Law Does Not Displace State Statutes Regarding Shipwrecks Not Covered by the ASA

Even though there is no congressional intent to preempt Section 6313, the Ninth Circuit found preemption in the general maritime law left intact by the ASA. Specifically, the

Ninth Circuit held that Congress intended only to transfer to the States the vessels meeting the requirements of 43 U.S.C. § 2105(a), with the remainder of the vessels being governed by the "exclusive admiralty jurisdiction of the federal court" pursuant to the savings clause contained in 43 U.S.C. § 2106(b). Pet.App. A7–A8. The Ninth Circuit apparently believed, erroneously, both that federal courts have exclusive jurisdiction over matters of maritime law, and that the source of law affecting matters maritime is solely federal.

Federal admiralty courts do not have exclusive jurisdiction to decide questions of maritime law. *See* 28 U.S.C. § 1333(1) ("saving to suitors" clause); Thomas J. Schoenbaum, Admiralty and Maritime Law §§ 4–1, 4–2, pp. 134–135 (2d ed. 1994) ("State courts have concurrent jurisdiction over *in personam* admiralty lawsuits, and substantive state law plays a key and often complex role."). This Court has held:

> "Aside from its inability to provide a remedy *in rem* for a maritime cause of action, this Court has said that a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.'" *Madruga* v. *Superior Court*, 346 U.S. 556, 561 (1954), quoting *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924).

Nor is it true that the source of substantive maritime law is solely federal; maritime law takes its content from State law sources as well. *See Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373 (1959); Schoenbaum, *supra*, § 4–4, p. 143 ("[T]he actual scope of possible applications of state law in admiralty is quite broad; there are several theories under which decisional law or *legislation* (italics added) may be applied in maritime cases.")

That maritime law applies to non-ASA wrecks does not mean that State statutes, like Section 6313, are necessarily preempted. *Romero, supra*, 358 U.S. at 373 ("rights pertaining to matters maritime" are not rooted solely in federal law;

States accorded a wide scope). There are numerous instances where State law provides the governing maritime law rule. *See id.*, at 374 ("Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history."); *see also East River Steamship Corp.* v. *Transamerica Delaval Inc.*, 476 U.S. 858, 864–865 (1986) ("general maritime law" is "[d]rawn from state and federal sources"). Whether State law is "incorporated" into federal maritime law (as in other federal common law contexts), or whether State law stands of its own force and is not displaced (as in the usual federal-state preemption context), is unimportant. *See Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 40 F.3d 622, 628 (3d Cir. 1994), *aff'd*, __U.S.__, 116 S.Ct. 619 (1996).

As outlined in the statement of the case, California has regulated recovery of shipwrecks since 1959. In 1989, in response to section 2103 of the ASA, the California legislature enacted its Shipwreck Program, which explicitly claims title to shipwrecks and other archaeological sites and historic resources located on California's sovereign lands. Cal. Pub. Res. Code § 6313(a). The Commission may condition salvage permits as it deems necessary to protect its lands and historic resources that lie upon them. Cal. Pub. Res. Code §§ 6309(b), (d), 6313(d). The California program is partially based on State ownership of the abandoned historic vessels, but encompasses all historic shipwrecks on California's sovereign lands, not just those that are State-owned.[27]

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27. Regardless of ownership, the Commission is given authority to issue permits for the recovery of any object lying in or upon State submerged lands. Cal. Pub. Res. Code § 6309(b), (d). If the *Brother Jonathan* is California's property, then it may put whatever restrictions it sees fit upon the vessel's salvage, up to and including the denial of any salvage of the vessel. *See Lathrop* v. *Unidentified, Wrecked and Abandoned Vessel*, 817 F.Supp. 953, 964–65 (M.D. Fla. 1993); *Jupiter Wreck, Inc.* v. *Unidentified Sailing Vessel*, 691 F.Supp. 1377, 1389 (S.D. Fla. 1988);

The characteristic features of maritime law that California's Shipwreck Program, including Section 6313, allegedly affects impermissibly are the law of finds and the law of salvage. California's Shipwreck Program works material prejudice to neither. As outlined in the statement of the case, California has had a general statutory scheme for protection of its historical and archaeological resources since 1974. California's Shipwreck Program is a specific application of that general program to California's submerged lands. Its incidental and attenuated affects on admiralty law are well within the State's regulatory authority.

As already demonstrated, a recognized exception to the law of finds is that abandoned property belongs to the owner of the land where the property is found if the owner asserts "constructive possession" of the property. *See Klein* v. *Unidentified, Wrecked Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *Lathrop* v. *Unidentified, Wrecked and Abandoned Vessel*, 817 F.Supp. 953, 965 (M.D. Fla. 1993); *Jupiter Wreck, Inc.* v. *Unidentified Sailing Vessel*, 691 F.Supp. 1377, 1386 (S.D. Fla. 1988). Section 6313 merely provides the assertion of constructive possession by the State over property on its submerged land for purposes of the law of finds. Section 6313 therefore does not conflict with federal maritime law, but operates consistently within it.

Nor could Section 6313 materially prejudice a "characteristic feature" of general maritime law, because the law of finds

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Thomas J. Schoenbaum, Admiralty and Maritime Law § 16-1, p. 326 (2d ed. 1994) (salvage cannot be forced upon an owner). Even if the vessel or some portion of the cargo has not been abandoned and DSR can carry its burden that it does own the vessel or some specific portion of the cargo, California may still regulate the salvage activities taking place on its sovereign submerged lands in order to protect the archaeological and historical value of the shipwreck. *See Subaqueous Exploration* v. *Unidentified, Wrecked Vessel*, 577 F.Supp. 597, 609-13 (D. Md. 1983); *Lathrop*, *supra*, 817 F.Supp. at 962-64; *cf. Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123-128 (1978).

neither originated in, nor is exclusively applied in, maritime law. *See Zych* v. *Unidentified, Wrecked and Abandoned Vessel Believed to be the "Seabird,"* 941 F.2d 525, 532, n.10 (7th Cir. 1991) ("The law of finds *developed at common law* but has come to be considered a maritime concept (italics added)."); David R. Owen, *The Abandoned Shipwreck Act of 1987: Good-Bye to Salvage in the Territorial Sea*, 19 J. Mar. L. & Com. 499, 510 (1988). California's regulation of the salvage of historic vessels likewise does not "materially prejudice" the law of salvage. Historic vessels carry the priceless history of bygone eras. The reasonable and limited permitting and supervisory powers given to the Commission are designed to protect the historical resources of the people of California from unsupervised salvage by those whose interest may be purely monetary. Further, Congress has actively encouraged such regulation.

The basic preemption framework in admiralty law is that State law may not be applied if it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994), quoting *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 216 (1917).

The Court's approach to this issue is exemplified by *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973). There, the State of Florida enacted a comprehensive oil spill statute that established strict liability for damages caused by the discharge of petroleum products in the State's waters and that mandated the possession of containment gear and other equipment by those handling oil. This Court, after finding no express preemption by the federal Water Quality Improvement Act, also held, on the independent question of harmony with maritime law, that while the Florida Act did impose obligations over and above those of maritime law, it did not materially affect a characteristic feature of maritime law. *Id.*, at 337, 343-344. The Court recognized that State regulatory

schemes could dovetail comfortably with general maritime law:

> "[A] State, in the exercise of its police power, may establish rules applicable on land and water, within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of maritime law. . . .'" *Id.*, at 339.

The Court then went on to list specific examples of State laws that had been found permissible, such as local pilotage laws, local vessel safety inspections, and local regulation of docks and wharves. *Id.*, at 343.

Whether California's Shipwreck Program "materially prejudices a characteristic feature of maritime law" is answered by the analysis in *Askew*. There, Congress had recognized the severity of the problem—oil spills—and had enacted legislation in the area. *Id.*, at 329. In the federal legislation, Congress specifically recognized that States would be free to adopt additional oil spill prevention requirements. *Id.*, at 332. Florida followed with its more detailed program. *Id.*, at 328. This Court recognized that the State's police power was broad enough to regulate oil spills, even if it meant State regulation touching upon maritime law. *Id.*, at 328–329 ("To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent.").

Likewise, Congress has recognized the importance of the historic resources on the States' submerged lands and has encouraged the States to manage and protect them. To hold that general maritime law prevents California's reasonable regulation of salvage for this limited purpose is to allow "federal admiralty jurisdiction to swallow most of the police

power of the States" over the unauthorized salvage, and perhaps needless destruction, of a State's maritime history.

In addition, some cases have questioned the very applicability of salvage law to historic vessels:

> "[B]ecause application of maritime salvage law was predicated on the fiction that the owner of the wrecked vessel was still in existence, it would be absurd to apply maritime salvage law to a vessel whose very location has been lost for centuries." *Klein, supra*, 758 F.2d at 1514; *accord, Treasure Salvors, Inc.* v. *Unidentified Wrecked Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978).

The law of salvage developed to encourage those observing ships and cargo in immediate peril to undertake rescue efforts. Schoenbaum, *supra*, § 16–7, p. 341. This underlying policy has no application to shipwrecks that have lain on the bottom for many years, sometimes centuries. Congress was clear in the legislative history of the ASA that, regarding ships covered by the ASA, they were not to be considered in "marine peril," necessitating their recovery by salvors. H.R. Rep. No. 100–514, 100th Cong., 2d Sess., Pt. II (1988) *reprinted in* 1988 U.S.C.C.A.N. 370, 377.

This Court has admitted that "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence." *American Dredging*, *supra*, 510 U.S. at 452. Many State laws have been upheld even though they are not in complete conformance with federal maritime rules. *See, e.g., Romero, supra*, 358 U.S. at 373 (citing cases). The "harmony/uniformity" dimension of *Jensen* largely turns on the "balance of federal and state interests" at issue. *See, e.g., Pacific Merchant Shipping Assn.* v. *Aubry*, 918 F.2d 1409, 1424 (9th Cir. 1990) (permitting application of State overtime provisions to maritime employees); *Ballard Shipping Co.* v. *Beach Shellfish*, 32 F.3d 623, 628, 631 (1st Cir. 1994) (up-

holding State statute allowing recovery for purely economic loss caused by closure of shellfishing due to oil spill).

As in *Aubry* and *Ballard*, the balance here tips in favor of the State. The State's interest in preserving and protecting its archaeological and historical patrimony on its sovereign lands is a vital State interest. In enacting the Shipwreck Program, the California legislature was simply extending its police power regulation to sites of historical importance on State-owned submerged lands that it had exercised since 1974 over upland areas. *See* Cal. Stats. 1974, ch. 1156. In contrast, the federal maritime interest in supplanting State regulation of long-lost wrecks is minimal. "[T]he fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Exxon Corp.* v. *Central Gulf Lines*, 500 U.S. 603, 608 (1991), quoting *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674 (1982). Because the 130-year-old wreck of the *Brother Jonathan* has long since lost any connection with active maritime commerce, the federal maritime interest is either greatly attenuated or gone entirely.

IV. CALIFORNIA SHOULD BE RESTORED TO ITS POSITION PRIOR TO INSTITUTION OF THIS *IN REM* PROCEEDING

The State of California and the State Lands Commission ask, in order to fully vindicate the State's Eleventh Amendment immunity, that California be placed back where it was before the district court erred, that is, to its position prior to the arrest of the *Brother Jonathan* and prior to the orders appointing DSR as custodian and exclusive salvor and enjoining all others, including the State, from interfering.

Where a State claims ownership of a vessel, a federal district court sitting in admiralty may not order arrest of the vessel. *Ex parte New York, No. 2*, 256 U.S. 503 (1921). If the Eleventh Amendment bars prosecution of a suit *in rem* in admiralty against a State, it also bars issuance of process against the *res* claimed by the State. *See Treasure Salvors,*

supra, 458 U.S. at 703 ("enforcement of process by arrest of the res is [not] divorced from the action to determine the State's claim to the res") (White, J., concurring and dissenting, joined by then Associate Justice Rehnquist and Justices O'Connor and Powell). This does not mean that other parties may not proceed in admiralty court with their claims to a vessel or its cargo, if jurisdiction otherwise exists; it means only that they are left to their *in personam* remedies, in common with the vast majority of litigants generally. At minimum, the State is entitled to dismissal from the *in rem* proceeding.

Further, this Court has the authority, pursuant to 28 U.S.C. § 2106, to enter orders "necessary and appropriate to the final disposition of a suit" that is before it for decision. *U.S. Bancorp Mortgage Co.* v. *Bonner*, 513 U.S. 18, 20–22 (1994). In any subsequent action between California and DSR in State court, the State will be placed at a disadvantage should the legal rulings and factual findings of the Ninth Circuit and the district court in this case retain any viability. While they would not be binding on the State court, the practical result could well be that such rulings and findings would greatly influence the State court in its decision. California asks, therefore, that the Court vacate the decision of the Ninth Circuit and direct the Ninth Circuit to vacate the district court decision that denied the State's motion for dismissal. *See Arizonans for Official English* v. *Arizona*, __U.S.__, 117 S.Ct. 1055, 1071 (1997); *United States* v. *Williams*, 904 F.2d 7, 8 (7th Cir. 1990) ("[W]hen a conviction is vacated, the effect is to nullify the judgment entirely and place the parties in the position of no trial having taken place at all."); *Sea Ranch Assn.* v. *California Coastal Comm'n*, 454 U.S. 1070 (1981) (vacating district court judgment and remanding for consideration of mootness).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the decision of the Ninth Circuit Court of Appeals, vacate the Ninth Circuit's opinion, and direct the court of appeals to (a) vacate the district court opinion on denial of the State's motion to dismiss, (b) vacate the district court orders for arrest of the vessel and appointment of DSR as exclusive salvor, and (c) order dismissal of the State of California from the pending action.

Respectfully submitted,

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APPENDIX

Statement Attributed to Jacob Yates, Quartermaster on Watch, Given at an Inquest in San Francisco After the Loss of the *Brother Jonathan*:

On Sunday, when I took the wheel at 12 o'clock noon, it was blowing a heavy gale of wind from the northwest, and we were 4 miles above Point St. George. The sea was running mountains high, and the ship was not making any headway. Capt. DeWolf thought it proper to turn back, run into Crescent City, and wait until the storm ceased. He ordered me to put the helm hard a-port, which I did, and then he told me to steady her. I did so. Her course was then due east. The time about a quarter to 1 P.M.

I kept her [on] that course until we made the Seal Rock, and then the Captain ordered me to keep her Southeast by South. It was clear where we were, but foggy and smoky inshore. Then we run along until 10 minutes of 2 o'clock P.M., when she struck the unknown sunken rock, and with such force that it felled the passengers who were standing on the deck. Some of the deck planks started. The Captain stopped the engine and endeavored to back her off. The engineer could not get her to move an inch. She rolled about five minutes and then gave another tremendous thump on the rock, when part of the keel came up alongside; and by that time the sea and wind had slewed her around so that her head came to the wind and sea.

As soon as she came head to the sea, she worked off the rock a little; then her foremast went down through her bottom until the foreyard brought up across the decks. At this time Capt. DeWolf had been forward three times and ordered everybody to look out for themselves, and he would do the best he could for them all. I was the last one that left the forward part of the ship. As I was going aft I saw a lady and gentleman standing close by the boat. I asked them why they did not get into this boat, for it was all ready to lower? And they gave their heads a toss and told me they were going to get in the other boat. There was plenty of room in the boat at that time.

As I was one of the crew of the boat, and she was being

lowered, I got in her. If they had got in I would have taken my chance in another. The boat ahead of us was filled with women. I did not pay any more attention to the boat until she was lowered. The Captain said "There was enough in that boat."

I had not seen Mr. Allen, the First Officer, until the Captain ordered [our] boat lowered; then he lowered one end of it.

We got our boat clear from the wreck and astern of the ship. I did not see the Second Officer at all. As we came around the stern we saw a boat swamped, which was full of women; and one boat capsized, with a man on her bottom, and also another one stove to pieces. Our boat was so full that we could not take another soul into it. We would have gone to the assistance of the boat-load of ladies who were swamped, but the sea was running so high and we were so heavily loaded, that we could not do anything for them.

I believe that if the passengers had listened to the Captain and manned the boats with the ship's crew, as he wished them to do, there would have been more lives saved, for there is not a ship that sails out of San Francisco which has a better crew. As for an item mentioning in the *Bulletin* that the crew were Kanakas, I can say that there was not one Kanaka among them.

—Appendix B to Respondent's opposition to California's application for a stay and injunction, filed with the Supreme Court on or about June 26, 1997.